

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,255

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 24 1962

CHARLES W. POOLE, *Appellant*,

Joseph W. Strang
CLERK

v.

TERMINIX COMPANY OF MARYLAND AND WASHINGTON, INC.,
a Corporation, *Appellee*.

638

Appeal from the Municipal Court of Appeals
for the District of Columbia

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707 Munsey Building,
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No. 11,255

THE QUESTION PRESENTED

The question raised by this appeal is when does the statute of limitations begin to run in a breach of warranty action? The Municipal Court of Appeals held that the time began to run at the time of the breach. Appellant contends the time commenced when the breach was discovered or should have been discovered.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,255

CHARLES W. POOLE, *Appellant*,

v.

TERMINIX COMPANY OF MARYLAND AND WASHINGTON, INC.,
a Corporation, *Appellee*.

Appeal from the Municipal Court of Appeals
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is brought pursuant to Section 11-773 D. C. Code 1940 Ed.) 56 Stat. 196, (1942), from a judgment of the Municipal Court of Appeals, and pursuant to an order of this Court dated January 18, 1952 granting the appeal.

STATEMENT OF THE CASE

This case originated from a contract to insulate the premises 6119 Brookville Road against attacks of termites. The contract was entered into by the Terminix Company of Maryland and Washington, Inc., appellee, and F. A. Tweed, former owner of 6119 Brookville Road. Subsequently the contract was assigned to Charles W. Poole, appellant, upon his purchase of the house. (Jt. App. 22). Appellant redecorated his home shortly after moving in and, as a part of the general repair work, had a guaranteed water-proofing job done on the basement. Part of the waterproofing consisted of installing a tile drainage system around the perimeter of the basement and beneath the cellar floor. (Jt. App. 16).

Pursuant to the contract for insulation Terminix made several inspections and applications. On one of the application trips, after appellant had waterproofed his basement, on or about April 15, 1946, the Terminix Co. drilled holes in the cement floor and around the perimeter of appellant's basement (Jt. App. 15, 16). Appellant was assured that nothing was damaged (Jt. App. 16). In April of 1949 appellant discovered leakage in his basement and the tile drain installed beneath the cement floor was found to be damaged. (Jt. App. 19, 20). Plaintiff filed suit in July of 1949 alleging that the drilling done by Terminix was not done in a workmanlike manner in that the tile drain beneath the floor was injured by the drilling. (Jt. App. 23). At the close of appellant's case the Municipal Court held that the statute of limitations had run before appellant filed suit and entered judgment for appellee (Jt. App. 6, 7). On appeal the Municipal Court of Appeals affirmed that judgment. (Jt. App. 8-14).

STATUTE INVOLVED

Section 12-201 of the District of Columbia Code (1940 Ed.) provides in pertinent part:

“No action shall be brought * * * upon any simple contract, express or implied, or for the recovery of damages for any injury to real or personal property, or for the recovery of personal property or damages for its unlawful detention after three years from the time when the right to maintain any such action shall have accrued * * *”

STATEMENT OF POINTS

The Municipal Court of Appeals erred in holding that the statute of limitations began to run at the time the breach of warranty occurred.

SUMMARY OF THE ARGUMENT

The rule relating to commencement of the statute of limitations has been settled in this jurisdiction by the case of *P. H. Sheehy Company v. Eastern Importing and Mfg. Co.*, 44 App. D. C. 107 (1915). That case clearly holds that the statute of limitations begins to run when the breach is discovered or should reasonably have been discovered.

It was not reasonable for appellant to discover the breach immediately upon the occurrence because the nature of the injury was such to preclude its immediate discovery. The breach complained of was performance of the drilling operation in such a manner as to injure the drain tile beneath the cellar floor thereby breaching an implied warranty that work would be done in a skillful workmanlike manner. Since the evidence of the breach— injury to the tile—was located beneath a cement floor ap-

pellant could not discover it until the cement floor was broken open or dampness became visible.

There is no reason at all for this court to overrule its prior decision regarding the commencement of the statute of limitations. There are many reasons why the Court should affirm its rule. The development of complex construction techniques increase the hazards of hidden defects and the necessity for protection of the innocent purchaser.

ARGUMENT

A. The Statute Begins to Run Upon Discovery of the Breach.

Appellant has brought this case alleging breach of implied warranty that work done will be done in a skillful workmanlike manner. In every contract for performance of service or work there is an implied warranty that the job will be done skillfully and in a workmanlike manner.¹ The statute of limitations for this action, as provided in Sec. 12-201 D. C. Code (1940 Ed.), is three years.

At the close of appellant's case the trial judge ruled as follows: (Jt. App. 24)

"The Court is going to hold that the statute began to run on April 15, 1946, and that the suit was filed on August 18, 1949;

"That the plaintiff knew during the years 1946 to 1949 that his basement was damp;

"And his basement was damp when he entered the premises. The mere fact that he saw some water coming from a hole under the floor is not sufficient to sustain the action and, therefore, the Court holds

¹ *Economy Fuse & Mfg. Co. v. Raymond Concrete Pile Co.* 111 F. (2d) 875 (C.C.A. 7th, 1940).

Maloney Tank Co. v. Mid-Continent Petroleum Co. 49 F. (2d) 146 (C.C.A. 10th, 1931).

the action filed on August 18, 1949 was filed too late."

On appeal to the Municipal Court of Appeals the ruling of the trial judge was affirmed (Jt. App. 8-14).

In so holding the Municipal Court of Appeals held that the statute of limitations runs against a breach of warranty at the time of the breach in every instance except in the case of fraud or constructive fraud. This is directly contrary to this court's decision in the *P. H. Sheehy Co.* case, *supra*.

The question in the *Sheehy* case was framed by Chief Justice Shepard thus:

"The question in this case is when the statute of limitations began to run against defendant's demand in set-off.

"If from the date of sale and delivery, the set-off is barred. If it began to run only from the discovery of the condition of the sardines or from such time as this condition could reasonably have been discovered as pleaded, the judgment must be reversed."

On page 111 this court held:

"It cannot be said that a person should assert a right before he has knowledge of, or is chargeable with knowledge of, the same.

"He must ordinarily have had such opportunity to ascertain his position as would be sufficient in the case of a man of ordinary intelligence and prudence under the circumstances of the case."

The Municipal Court of Appeals held that the *Sheehy* case involved constructive fraud because of the concealment of the quality of the sardines in cans. There was no allegation of fraud in the case. It was disposed of by the District Court on pleadings and affidavits none of which even implied the existence of fraud.² The decision

² See *Briefs and Records of the U. S. Court of Appeals* District of Columbia, Vol. 249, Bar Association Library.

of Chief Justice Shepard cannot be construed as resting on the ground that fraud was committed. It was a plain case of breach of warranty and is so recognized in the commentaries on the case.³ A similar rule has been established by court decisions in Texas,⁴ and by statute in Louisiana.⁵

The present case involves a very similar situation. Here the breach was unskillful performance of work causing injury to property. There, the breach was one of quality of sardines. Here the breach was concealed beneath the cement cellar floor. There, it was concealed in cans. In neither case was the breach readily discernible.

B. It Was Not Reasonable to Expect Discovery Before 1949.

The record is clear that the damage done to the drain tile was not discovered until April of 1949. (Jt. App. 23). It is also certain that there was no cause to suspect any damage until the early spring of 1949 when the basement began to leak. It certainly is not reasonable to require that appellant, after the drilling was done, tear up the cellar floor to examine his drainage system especially when he was assured that no damage had occurred (Jt. App. 16). The chronology of events shows that appellant acted with promptness. The drilling complained of occurred in April of 1946; the damage was discovered in April of 1949; the suit was brought in July of 1949. Only three months elapsed between discovery of the injury and the commencement of the action.

³ See: L.R.A. 1916 F, 810, 813; Williston on Contracts 1920 Ed., Sec. 2020.

⁴ *First National Bank v. Roller* 299 S.W. 917 (1927).

⁵ See: *Cox v. DeSoto Crude Oil* 55 Fed. Supp. 467 (1944).

**C. There is no Reason to Modify or Change
the Existing Rule.**

It is necessary to analyze briefly the holding of this court in *Zellan v. Cole*, 87 U. S. App. D. C. 9; 183 F. (2d) 139, 140, because it was the view of the Municipal Court of Appeals that it is authority for holding that the statute of limitations commences on the occurrence of the breach. The question confronting this court in the *Zellan* case did not involve the same question. There the Municipal Court of Appeals held that, by attempting to remedy the breach of warranty, the statute of limitations was tolled until all corrective efforts ceased.⁶ The warranty there was that the basement of a house was dry and would remain dry for three years. The Municipal Court of Appeals stated that:

“It is the law in this jurisdiction that the statute of limitations begins to run against the claim for breach of warranty from the time the buyer discovers the breach or, by the exercise of ordinary diligence, could have discovered it.” (citing the *Sheehy* case)

The court then held the statute was tolled. On appeal to this court it was held that the warranty was a promise to maintain and that the statute of limitations did not begin until efforts to remedy the damp basement were halted. This court did not dispute the general rule as stated by the Municipal Court of Appeals. Chief Judge Stevens dissented on the ground that the warranty was not a warranty to maintain and that the breach of warranty occurred upon the basement becoming wet. There he said “the time within which they must sue would commence to run immediately upon discovery of the breach.” The point involved in the *Zellan* appeal was tolling of the statute.

⁶ *Cole v. Zellan* 55 Atl. 2d 516 (1946).

The rule as stated in the *Sheehy* case stands as the law in this jurisdiction. No persuasive reason can be advanced urging change or modification. There are many reasons why this rule is even more adaptable to present conditions. Modern construction techniques have become more complex calling for increasing use of specialists which makes it impossible for the ordinary individual to understand such things as the complicated electrical circuits or plumbing fixtures or heating units. This increases the chances of his being damaged without discovering it and leaves him without a remedy if a defective condition turns up over three years later as in this case. Some one must carry the risk of hidden damages and the skilled specialist who performs the job is better able to carry it.

CONCLUSION

The judgment of the Municipal Court of Appeals should be reversed and the case remanded to the Municipal Court for a new trial.

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,255

CHARLES W. POOLE, *Appellant*,

v.

TERMINIX COMPANY OF MARYLAND AND WASHINGTON, INC.,
a Corporation, *Appellee*.

Appeal from the Municipal Court of Appeals
for the District of Columbia

JOINT APPENDIX

Filed Mar 16 10:58 AM 50
Walter F. Bramhall, Clerk of Municipal Court
Washington, D. C.

*Amended Complaint for Breach of Implied Warranty and
Negligent Injury to Property and Upon
Contract of Guaranty*

1. The defendant Terminix Co. of Maryland and Washington, Inc., is a corporation doing business within the jurisdiction of the District of Columbia. The defendant E. L. Bruce Co. is a corporation doing business within the jurisdiction of the District of Columbia. The amount in controversy is less than \$3,000, and the matters and parties are subject to the jurisdiction of this Court.

2. On or about January 8, 1943 the defendant Terminix Co. of Maryland & Washington, Inc. entered into a sealed contract with a Mr. F. A. Tweed by the terms of which the defendant undertook to insulate the home of the said F. A. Tweed, 6119 Brookville Road, Chevy Chase, Maryland, against attacks of termites. The contract further provided that if the premises still were infested with termites additional applications would be made. The defendant E. L. Bruce Co. was also party to the aforesaid contract and by agreement under seal guaranteed fulfillment of the terms of said contract by its Licensee, defendant Terminix Co. of Maryland and Washington, Inc. A copy of the said contract is attached to this complaint.

3. On January 20, 1943 the Terminix Co. of Maryland & Washington, Inc. made initial applications of Terminix insulating materials. In May of 1943 the said premises of 6119 Brookville Road, Chevy Chase, Maryland were sold by the said F. A. Tweed to Charles W. Poole, plaintiff in the above-entitled action. The defendant Terminix Co. of Maryland & Washington, Inc., subsequent to the

sale made periodic inspection trips to the premises and answered calls of Plaintiff, Charles W. Poole, reapplying the terminix insulation materials on discovery that termites had penetrated and were still infesting the premises. By the foregoing acts of the defendant Terminix Co., said defendant recognized an assignment of the contract to the plaintiff, Charles W. Poole.

87 4. The defendant, Terminix Co. of Maryland and Washington, Inc. has at all times held itself out to be skilled and expert in the field of insulating buildings against attacks of termites. Plaintiff, Charles W. Poole, relying on such representations of skill and expertness and pursuant to the said contract entered into by and between the defendant, Terminix Co. and the said F. A. Tweed, and assigned to the plaintiff, Charles W. Poole, allowed the defendant and its agents to come on the premises for the purpose of applying the Terminix insulation against the recurring attacks of termites as stated in paragraph 3. In the process of applications of the Terminix insulation, defendant, by its agents, undertook to drill and bore holes in the floor of the cellar at 6119 Brookville Road, Chevy Chase, Maryland, on or about April 15, 1946, on information and belief. Said drilling and boring was not done in a workmanlike manner as warranted in the contract, in that the drilling and boring injured and destroyed a tile drainage system beneath the cellar of the aforementioned premises, which injury and destruction was not discovered by plaintiff until the present year, 1949.

5. By reason of the destruction and injury of the aforementioned tile drainage system, water was allowed to seep under the cement floor of said cellar causing the cement to crack and the cellar to flood. Because of said cracking of the cellar floor and flooding at periodic intervals the plaintiff was damaged to the extent of \$2,000.00.

6. Plaintiff also asserts that the injury to the basement and drainage system thereunder was caused by the negligence of the defendant and its agents in the application of the insulating materials as stated in paragraph 4. That by reason of said negligence plaintiff, Charles W. Poole was damaged to the extent of \$2,000.00.

7. Defendant, E. L. Bruce Co., is sued in its capacity as guarantor as aforesaid of the performance by defendant, Terminix Co. of Maryland & Washington, Inc. of the terms of said contract of January 8, 1943.

WHEREFORE, plaintiff prays that judgment be entered in his behalf against the defendant, Terminix Co. of Washington and Maryland, Inc., and the defendant, E. L. Bruce Co., in the sum of \$2,000.00 plus costs
88 and interest, and for such further relief as to the Court may seem proper.

/s/ Preston C. King, Jr.
Preston C. King, Jr.

* * * *

89 Filed Mar 27 11:21 AM 50 Walter F.

Bramhall Clerk of Municipal Court Washington, D. C.

*Answer of Defendant, Terminix Company, to the
Amended Complaint*

The defendant and third-party plaintiff, Terminix Company of Maryland and Washington, Inc., a corporation, by way of answer to the amended complaint herein, adopts as its answer the original answer of defendant to the complaint and expressly prays that the same may be read and considered as the answer to said amended complaint.

* * * *

Filed Nov 23 11:47 AM 49
Walter F. Bramhall Clerk of Municipal Court
Washington, D. C.

Answer of Defendant to Complaint
First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

1. The defendant admits the allegations of paragraph one of the complaint.

2. Defendant admits allegations of paragraph two of the complaint with the exception that it denies that said contract was under seal.

3. Defendant admits the allegations of paragraph three with the exception that it states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations as concern the sale of the said premises as alleged in paragraph three and defendant denies that it ever recognized an assignment of the contract to the plaintiff, Charles W. Poole, as alleged.

4. Defendant admits the allegations of paragraph four of the complaint with the exception of the allegation that the plaintiff relied on the representations as alleged in paragraph four. The defendant further denies the last 4 lines of the allegations of paragraph four of the complaint and the more definite statement supplied by the plaintiff.

5. The defendant denies the allegations of paragraph five of the complaint.

6. The defendant denies the allegations of paragraph six of the complaint.

Third Defense

The defendant avers that any claim which the plaintiff may have had against this defendant is barred by the Statute of Limitations.

Fourth Defense

The defendant further avers that there is no privity of contract existing between the plaintiff and the defendant.

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Fifth Defense

The defendant further avers that the damages, if any, sustained by the plaintiff were the result of and caused by the contributory negligence of the plaintiff.

/s/ Thomas B. Heffelfinger
Thomas B. Heffelfinger
Attorney for Defendant

* * * *

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Trial—Finding

May 25, 1951

Judge Howard

Motion of defendant Terminix Co., etc., for directed finding, granted; wherefore, finding for defendant Terminix Co., etc., with costs.

Further, motion of third-party defendant The Fidelity and Casualty Company of New York for directed finding, granted; wherefore, finding for third-party defendant The Fidelity and Casualty Company of New York on third-party complaint, with costs.

Said motions and findings at close of plaintiff's case.

7 A

Judgment

May 31, 1951

Judge Howard

Final Judgment for defendant on motion for directed finding with costs, and further finding for the third-party defendant on motion for directed finding and costs from the date of judgment. Said motions and findings made at the close of the plaintiff's case.

* * * *

Opinion

126 THE MUNICIPAL COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 1109

CHARLES W. POOLE, Appellant,

v.

TERMINIX COMPANY OF MARYLAND AND
WASHINGTON, INC., a corporation,

and

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, a corporation, Appellees.

Appeal from The Municipal Court for the
District of Columbia,

Civil Division.

(Argued November 5, 1951 Decided November 30, 1951)

Dickson R. Loos, with whom *Preston C. King, Jr.* was on the brief, for appellant.

Thomas B. Heffelfinger for appellee Terminix Company.

Bernard J. Gallagher, with whom *J. Roy Thompson, Jr.* was on the brief, for appellee Fidelity and Casualty Company.

Before Cayton, Chief Judge, Hood, associate Judge, and Myers, Associate Judge of the Municipal Court for the District of Columbia.¹

MYERS, *Acting Associate Judge*: This appeal is from a finding in favor of the defendants at the conclusion of the plaintiff's evidence because the action was barred by the statute of limitations. The complaint alleged that the defendants, Terminix Company and E. L. Bruce Company (which was never served), by written contract dated January 8, 1943, undertook to insulate the house of one F. A. Tweed in Chevy Chase, Maryland, against the attacks of termites. On January 20, 1943, Terminix made initial applications of insulating materials. In May 1943 the house was sold to the plaintiff, Charles W. Poole. Subsequently, due to the continued presence of termites, the defendant made periodic inspection trips to the premises to re-apply the insulating materials. In the process of these applications on or about April 15, 1946, the defendant through its agents drilled and bored holes in the floor of the cellar. Plaintiff alleged that, in the drilling of these holes, a tile drainage system beneath the floor was damaged, thereby allowing water to seep through and flood the cellar. It was alleged that the plaintiff did not discover until 1949 that the cause of this seepage was damage to the tile drainage system due to the careless work of defendant's agents. The complaint sought damages in the amount of \$2,000.

Defendant, Terminix Company, was allowed to bring in the Fidelity and Casualty Company of New York, a corporation, as third-party defendant on the ground that the latter, by virtue of a policy of insurance issued to the defendant on January 8, 1946, promised to pay all sums which the defendant should become obligated to

¹ Sitting by designation, pursuant to the provisions of Code 1940, Supp. VII, 11-771.

pay the plaintiff for damages due to injury or destruction of the property as charged in the complaint.

On this appeal plaintiff predicates his claim solely upon "a breach of implied warranty of a written contract" and asserts that his right of action did not accrue until he discovered in 1948 or 1949 that the cause of the wetness in his cellar was due to failure by defendant to do its insulating work properly.

The trial judge ruled that on plaintiff's own testimony his action filed July 18, 1949 was barred by the three-year statute of limitations.² At the same time, he also granted the third-party defendant's motion for a finding in its favor. The record is not too clear as to his basis for that action. But in view of our decision as to the judgment in favor of the principal defendant Terminix, this is of no importance.

The decisive question on this appeal is whether or not the statute of limitations started to run on April 15, 1946 when the alleged breach of implied warranty to do the insulating work in a proper manner occurred. The plaintiff testified that in April 1949 he noticed a considerable amount of water in his basement and that water was bubbling out through a crack in front of the cellar window as though there were an artesian well. He had the hole broken open and a long crack was found with a piece of terra cotta pipe running off at an angle. There was a hole in the terra cotta pipe, and the water was coming out of the hole at that spot. He further testified that before the drilling by the Terminix Company in 1946 his basement had been dry. He also identified the holes that had been drilled twelve to fourteen inches apart around the perimeter of the basement at that time.

² Code 1940, 12-201.

We are concerned here not so much with the exact date that the appellant discovered that the cause of the dampness in his cellar was due to the careless work of the defendant company under its insulation agreement as we are with the question—does the statute of limitations begin to run from the breach of an implied warranty or from the discovery of the breach of that warranty? Ordinarily, the statute of limitations in contract cases begins to run from the breach of the agreement. Statutes of limitation are frequently denominated statutes of repose but they do not protect any person who has perpetrated a fraud so that the breach does not come to the attention of the injured party until a later date. The cases seem clear that where fraud is involved, limitations do not start to run until there has been a discovery of the breach of implied warranty, or from the time when, by the exercise of reasonable diligence, the fraud could have been discovered.³

There is no contention that fraud is involved in the present case. The alleged breach of implied warranty lies in the unworkmanlike insulating activities of the defendant on April 15, 1946 when holes were drilled around the perimeter of the appellant's cellar. Appellant claimed that he did not discover the damage of those drillings to his tile drainage system until 1948 or 1949 because the holes were filled by defendant and the dampness did not appear until the latter years.

It is not necessary for this court to pass on the correctness of the trial judge's finding as to when the dampness was first noted in the cellar if we determine that the right of action accrued to the appellant in April 1946 and therefore was barred in July 1949 when this suit was filed. The law in this jurisdiction was very re-

³ *Kraft v. Lowe*, D. C. Mun. App., 77 A.2d 554, 79 W.L.R. 52.

cently stated in the case of *Zellan v. Cole*, 87 U. S. App. D. C. 9, 183 F. 2d 139, 140, as follows: "It is clear from these facts that the parties took the contract to be a promise to maintain a dry basement. Under this construction, the statute of limitations began to run when the contractor abandoned his efforts. . . . The view of this court is that *the statute began to run when the contract . . . was breached.*" (Italics supplied.) The dissenting opinion of Chief Judge Stephens held "that the time within which they must sue would commence to run immediately upon their discovery of a breach."

If legal injury was a natural consequence of the defendant's act, no matter how slight the damage, in the absence of fraud, limitations will start to run from the time that wrongful act was committed and even before ascertainment of the damages can be had. Mere want of knowledge by the owner of injury to his property does not prevent the running of the statute. *Houston Water-Works Co. v. Kennedy*, 70 Tex. 233, 8 S.W. 36 (in providing for water-pipe, arch support of house was undermined); *New Amsterdam Casualty Co. v. Baker*, D. C. D. Md., 74 F. Supp. 809 (suit by subrogee for reimbursement of damages due to breach of warranty of faulty dress material which caught fire and burned purchaser). To that same effect are *Wilcox v. Plummer*, 4 Pet. 172, 20 U. S. 172, 7 L. Ed. 821; *Amy v. Dubuque*, 98 U. S. 470, 25 L. Ed. 228; *Liberty Mut. Ins. Co. v. Sheila-Lynn, Inc.*, 185 Misc. 689, 57 N.Y.S. 2d 707, affirmed 270 App. Div. 835, 61 N.Y.S. 2d 373 (in suit on implied warranty, limitations begin to run at the time of the sale); *John S. Sills & Sons v. Bridgeton Condensed Milk Co.*, 3 Cir., 43 F. 2d 72 (limitations began from breach of warranty in sale of condensed milk when the milk became defective); *Aachen & Munich Fire Ins. Co. v. Morton*, 6 Cir. 156 Fed. 654 (limitations run from wrongful assignment of contract); *Pickett v. Aglinsky*, 4 Cir., 110 F. 2d 628 (limita-

tion as to malpractice claim runs from time that wrong is committed).

There appears to be a distinction made by some courts between a warranty as to kind or quality, which is broken when made, where the statutory period is computed from the date of the sale, and a warranty relating to a future event when its truth can be ascertained, which warranty is not broken until the future event happens. *Ingalls v. Angell*, 76 Wash. 692, 137 Pac. 309; *J. Kennard & Sons Carpet Co. v. Dornan*, 64 Mo. App. 17.

Appellant relies upon the case of *Sheehy v. Eastern I. & Mfg. Co.*, 44 App. D. C. 107, but this case was based upon constructive fraud in the concealment by the wholesaler of the defective condition of sardines in cans, because the court said, "Statutes of limitation were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights had never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure. And there is no reason why this principle should not be applicable to suits on the law side of the court as to those on the equity side." The sale there was made in August 1911, the defective condition was discovered in March 1912, and suit was filed for the breach of the warranty of the merchantability of the goods in November 1914.⁴

⁴ A somewhat analogous case is *Lewey v. H. C. Frick Coke Co.*, 166 Pa. 536, 31 Atl. 261.

We think under the ruling in the *Zellan* case, *supra*, that in the absence of fraud, actual or constructive, the statute of limitations begins to run at the time of the breach of the implied warranty. Certainly, were the present claim founded in tort, there could be no doubt that the limitations would start at the time of the commission of the negligent acts producing the injury. The statute of limitations in this jurisdiction is the same for tort as for breach of contract—three years. Here where the implied warranty was breached by alleged careless and negligent work done by the defendant company, it would seem fairer by analogy that the limitations on the right to recover damages for such work should start from the time that the work was carelessly done in April 1946.

The present case involves no breach of warranty as to the condition or quality of goods sold by defendant as to either its present or prospective state, but deals wholly with whether or not the action of defendant company in drilling holes in appellant's cellar in April 1946 to inject insulating material was done in a workmanlike manner. There is no evidence of concealment by the defendant company of the work that it performed in 1946. It did fill in the holes that it had bored in the cellar floor. This was necessary to complete the insulating work. Concealment by mere silence is not enough. There must be some trick or connivance intended to exclude suspicion and to prevent discovery of the cause of action by the use of ordinary diligence. No such charge is made against the defendant here, or disclosed by the record. Appellant testified that he did not discover that his cellar was damp due to the careless drilling of the holes in the floor until 1948 or 1949. In ordinary course, it could be reasonably anticipated that any damage, if due to the alleged negligent performance of the insulating contract, would have been revealed or discovered within three years.

Having determined that the statute of limitations ran from the time of the breach of the implied warranty to do the insulating work in a workmanlike manner and such breach having occurred in April 1946, appellant's right of action is barred because filed more than three years thereafter.

Affirmed.

* * * *

127 Charles W. Poole, Appellant,

v.

Terminix Company of Maryland and Washington, Inc.,
a corporation, and The Fidelity and Casualty Company
of New York, a corporation, Appellees.

No. 1109

October Term, 1951

Appeal from the Municipal Court for the District of Columbia, Civil Division. This cause came on to be heard on the transcript of the record from the Municipal Court for the District of Columbia, and was argued by counsel. On consideration thereof, It is now here ordered and adjudged by this Court that the judgment of the said Municipal Court, in this cause, be and the same is hereby, affirmed.

Frank H. Myers,
Acting Associate Judge.

November 30, 1951.

* * * *

2

Charles W. Poole,

plaintiff in the above-entitled cause, was called as a witness in his own behalf, and after having been sworn, was examined and testified as follows:

Direct Examination

BY MR. LOOS:

Q Would you state your name, please? A Charles Poole.

Q Where do you live, Mr. Poole? A At 6119 Brookville Road.

* * * *

4 Q No. What I had in mind, Mr. Poole, was whether or not the Terminix Company came out pursuant to your request or pursuant to the contract to make inspections or applications. A After we were in several months, they did. I don't remember exactly when it was. I don't remember whether I called them the first time or whether they automatically came out. I do know during the period which was a 5-year period that I talked with their office several times when we spotted signs of termite infestation, and I remember, also, that the office knew very definitely about our place—they must have a card or something they pulled—because the girl said, "Mr. Poole, you are lined up, due to have one of our regular inspections very shortly. Thanks for calling." And very shortly thereafter the people were out. They seemed to have a pattern; I believe it was twice a year.

* * * *

6 Q Would you please tell us about the circumstances of the application upon which you brought this action and the date that the application was made, please? A The only date that I can give was one which was given—and we have no reason to say it wasn't true—because it came from the records of the Terminix people. I had felt we had been in the home two years based upon a number of the times they came out. In 1946 in April, according to their records, they drilled holes in the basement entirely around the walls, on the inside

of the walls, through the concrete floor, and I, at that time, got there after those holes were drilled. I was there and spoke to their man about it because I was somewhat concerned over the fact that they had drilled right through those, and I spoke to him in that manner: I said, "My God, what is going on?" He said, "It is perfectly all right. It is perfectly all right. We know what we are doing and you won't have a bit of trouble from it."

So, I believe, that time that they may have been there even two days or—I am not sure—but they covered those holes up again, filled them with cement and then took off.

* * * *

7 Q Mr. Poole, could you tell us—you mentioned before that you had renovating work done in your home. Could you tell us what was done to your basement, specifically, when you moved in after purchasing the house? A First, our basement was cleaned very thoroughly, and we had the waterproofing people come in and they waterproofed by putting the part of their—their operation was, the terra cotta pipe that was laid around in the basement on the side, then they used a cement, and then apparently whitewashed over it,

8 might have used a white cement which came out beautifully which whitened the basement up, the walls, almost shoulder high. The basement was in very good condition then. I insisted the entire house was. I spent a lot of money on it. It had been an old home and apparently the people who had it did not use the basement, like people are using them today. We knew we would use it more, and that is why I insisted it was right.

Q Was the job that you had done a guaranteed job?

A Yes, sir: it was a guaranteed job.

Q May I ask you if this represents the certificate of guarantee for that job that was done? A Yes; that is it.

MR. LOOS: I would like to have this marked for identification.

(Thereupon, the certificate referred to above was marked Plaintiff's Exhibit No. 2 for identification.)

THE WITNESS: That also, I believe, was a 5-year warranty.

MR. GALLAGHER: Are you going to offer that in evidence?

MR. LOOS: Yes.

MR. GALLAGHER: Why don't we look at it first to see whether we agree to it?

MR. HEFFELFINGER: Might I ask if you propose to have anyone from this concern here today to testify in chief in your case?

9 MR. LOOS: No; I do not.

MR. HEFFELFINGER: Then I will object to any contract with anyone you don't propose to bring down for this examination.

MR. LOOS: I merely offer that as a certificate of guarantee for the job Mr. Poole had done for him when he moved into the house to show that there was a guarantee.

MR. HEFFELFINGER: There are two many exclusions in here, Your Honor, which we are going to offer expert testimony as far as this is concerned, probably, ourselves, but I object to any contract that he may have with any third person that he doesn't even propose to have down here as a witness, which he can very easily have down here.

THE COURT: I think you better hold that unless you are going to bring the person down here.

MR. LOOS: We have been trying to locate the gentleman who did this job and we have been unable to locate him.

We only show it for the limited purpose that Mr. Poole had a guaranteed job.

Now, the exclusions or anything else that Mr. Heffelfinger points out are apparent on its face. We just want to show it is there. That is the only purpose of that evidence. I submit it should be admissible for that limited purpose.

THE COURT: Since we don't have this man here for counsel to cross examine, the Court is going
10 to refuse to allow this right now.

MR. LOOS: Refuse to allow this?

THE COURT: Yes.

BY MR. LOOS:

Q Now, Mr. Poole, after you—

MR. GALLAGHER: Pardon me, Mr. Loos. I take it the objection would apply to me also?

THE COURT: Oh, yes; sure.

BY MR. LOOS:

Q Mr. Poole, after this drilling took place, could you describe to us briefly the change that you noticed in the character of your basement and when you first noticed it?

* * * *

11 THE WITNESS: I will go right down to the date that we actually discovered the injury and then tell you from there. I think that might do it. On this April day I had some men at home there that were working and we were in the basement, I believe, earlier that morning, and I know before, at an earlier time, such as several months before this—this was in April—we had had heavy rains. There was a considerable amount of water, even amounted to buckets full, on the basement floor directly under a window that was open and had been kept open at times for cross ventilation. The time I noticed it that morning, and the time that I noticed the water there once before I felt was due to the rain coming in.

Well, the water was taken up and removed, and I was there with these two men, and one of them said, "Look." And he pointed right down to the bottom of the floor there in front of this window where there was a fine stream of water trickling in. I said, "My gosh." He said, "Mr. Poole, do you mind if I open it up a bit?" I said, "No." He took a screw driver and pushed it down into this crack and water just bubbled out as though there was an artesian well.

MR. HEFFELFINGER: Is this prior to April 15 of '46 when you allege that the Terminix people did the drilling?

THE WITNESS: This was that April day.

12 MR. HEFFELFINGER: The same day they were there?

THE WITNESS: No; no. This was in April of '49. That is what you wanted to get—

MR. HEFFELFINGER: That is the date I want.

THE WITNESS: This was in April of '49.

* * * *

THE COURT: I did notice the complaint said that the damage wasn't noticed until '49.

THE WITNESS: That is right.

* * * *

13 A The water then sort of bubbled in just as though there were almost a well bubbling in there, and it came in rapidly. My man also said, "Mr. Poole, shall I open it a little bit further?" I said, "Sure; go ahead."

MR. HEFFELFINGER: I object to "my man" he is speaking of, and I object to any hearsay testimony.

THE COURT: Sustained.

* * * *

A Well, then we broke the hole open. Pryor actually did it—broke the hole open, and by that time the water had

somewhat receded. We could see in there. There was a long crack and a piece of terra cotta pipe there running off at an angle. It hit me like a flash at that time, that, my gosh—

MR. GALLAGHER: I object, Your Honor.

THE COURT: Don't tell us how it hit you. You tell us what you saw.

THE WITNESS: This hole was one that had been drilled by the termite people, was directly over this terra cotta pipe, and I realized—

MR. GALLAGHER: I object again.

THE WITNESS: I could tell—

THE COURT: Don't tell us what you realize; what you saw.

MR. LOOS: Just what you saw.

14 THE WITNESS: It had broken the terra cotta pipe.

MR. GALLAGHER: I object to that as a conclusion, Your Honor.

THE WITNESS: I don't see how else I could tell it.

THE COURT: Describe what you actually saw as to that condition of the pipe.

MR. LOOS: May I reframe a question then?

* * * *

Q Mr. Poole, would you tell us, was there a hole in the terra cotta pipe? A Yes; yes. The terra cotta pipe was broken.

Q Did the water appear to be running from that source? A Right at that spot it was coming in the basement.

* * * *

15 Q Was the hole in the terra cotta pipe underneath the hole that was drilled in the cement by the Terminix Company? A I couldn't see that.

* * * *

16 MR. LOOS: Your Honor, he has not admitted that he did not see the damaged pipe. He said he was not able to see whether the hole was directly underneath the hole that was on top that was drilled through the cement. In other words, to see whether they lined up or not.

* * * *

17 THE COURT: I think the objection is in order. Mr. Poole is telling what he saw from his own observation, but the Court doesn't feel he should speculate as to whether what he saw was directly attributable to the work done by the Terminix Company.

* * * *

23 THE COURT: Since he has testified that he doesn't know exactly what the Terminix Company did, I am afraid he is not capable.

MR. LOOS: My point merely was that he should be allowed to say how much the estimates were.

THE COURT: There is no question that Mr. Poole had some estimates, but still he is not in a position to tell the Court that the estimates for certain alleged damage was caused by Terminix.

* * * *

28 Q You first noticed the water coming in in the year 1949. A Yes.

* * * *

MR. HEFFELFINGER: Your Honor, I object at this time on the first ground that the copy of this alleged contract is dated April 29, 1949, subsequent to any date that this man, the plaintiff is now claiming any damage occurred.

I would also like to offer as the second ground of the objection that before this witness is permitted to testify further that the contract may be allowed in, I would like

to ask Mr. Poole if it is not a fact this contract
 29 was not actually signed, carried out or entered
 into; that he himself cancelled it before anything
 was done on the original contract. This was an offer
 by these people to furnish Terminix work but no pay-
 ments were made under it. This contract was cancelled.
 It was not entered into. It is dated April, 1949, and
 he is suing on something occurring in 1946.

* * * *

MR. HEFFELFINGER: Your Honor, as far as tying
 that up with any prior contract, he is suing on a con-
 tract which he says was entered into in January, 1943,
 not any contract in 1949, which has no bearing. Every-
 thing this man alleges took place prior to April, 1949.

* * * *

30 MR. HEFFELFINGER: With this understand-
 ing, of course, that I will have no objection, hav-
 31 ing let the contract go in for what that alleged
 paper shows on its face what it is to be.

* * * *

MR. LOOS: I would like to have marked for identi-
 fication the assignment executed by Mr. F. A. Tweed
 Sons. Mr. Tweed died. He died about August, 1950.
 I had his son here to prove his signature and Mr.
 Gallagher and Mr. Heffelfinger agreed the signature was
 valid, and that Mr. Tweed executed the same.

MR. HEFFELFINGER: Yes, sir, I stipulate it is.
 If Mr. Tweed were living and here he would testify
 that is his signature. That is all I will testify to.

* * * *

MR. LOOS: Then I would like to take this oppor-
 tunity to offer in evidence this paper as Plaintiff's
 Exhibit No. 3.

* * * *

Cross-Examination

* * * *

32 Q I think you testified after you purchased your home in the spring of 1943 that you did some extensive renovations which included waterproofing to the basement. Isn't that correct, sir? A Yes, sir.

Q How old is this house of yours, Mr. Poole? A Approximately 35 or 40 years old.

* * * *

34 Q Now, Mr. Poole, when you moved into the house you did drainage work, tile work. Why did you do it? A Because I wanted a dry basement.

Q Then prior to the time you did this work you
35 did not have a dry basement, did you? A Not to suit me.

Q Now when did you make claim in this case for any alleged damage, Mr. Poole, to the Terminix Company? A In April of 1949.

Q In other words, the building was done in April of 1946. As I understand you first noticed these little damp spots about April of 1948, is that correct? The first few months of 1949? A That would be approximately the time.

Q And then you waited until April of 1949 to get in touch with the Terminix Company, is that correct? A That is correct.

Q And when did you file suit in this case? A I would say five or six weeks after the damage was discovered and after they apparently were not going to do anything about it.

MR. HEFFELFINGER: When was the suit filed, Your Honor?

THE COURT: July 18, 1949.

BY MR. HEFFELFINGER:

Q July 18, 1949? A Yes.

* * * *

45

Recross-Examination

* * * *

46 A No; there was one drilling period they drilled holes in that floor.

Q That was in April, 1946? A That is correct, according to my records.

Q Did you actually see the holes drilled? A Yes, there were holes in the floor.

Q After drilling holes did they not fill each and every one of the holes up with concrete? A No, they did not. They told me they would fill it up with a water-proof cement.

* * * *

83

Finding of Fact

THE COURT: All right, gentlemen. The Court
84 is going to hold that the statute began to run on April 15, 1946, and that the suit was filed on August 18, 1949;

That the plaintiff knew during the years 1946 to 1949 that his basement was damp;

And his basement was damp when he entered the premises. The mere fact that he saw some water coming from a hole under the floor is not sufficient to sustain the action and, therefore, the Court holds the action filed on August 18, 1949, was filed too late.

* * * *

No. 11,255
BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES W. POOLE,
Appellant
vs.

TERMINIX COMPANY OF MARYLAND AND WASHINGTON, INC.,
a Corporation
Appellee

Appeal from the Municipal Court of Appeals
for the District of Columbia

THOMAS B. HEFFELFINGER
W. CAMERON BURTON
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1005 Investment Building
Washington 5, D. C.

No. 11,255

The Question is correctly stated by Appellant.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,255

CHARLES W. POOLE,

Appellant

VS.

TERMINIX COMPANY OF MARYLAND AND WASHINGTON, INC.,
a Corporation

Appellee

Appeal from the Municipal Court of Appeals
for the District of Columbia

BRIEF FOR APPELLEE

SUMMARY OF ARGUMENT

The Statute of Limitations begins to run on an action for breach of warranty when the breach occurs and it is only in cases involving fraud that the statute does not begin to run until the fraud is discovered or by the exercise of reasonable diligence could have been discovered.

ARGUMENT

1. The Statute of Limitations, in This Jurisdiction, Begins to Run, in the Absence of Fraud, Actual or Constructive, at the Time of the Breach, and Not From the Time When the Breach Is Discovered or Should Reasonably Have Been Discovered.

From the outset it must be borne in mind that the Appellant is not alleging nor is he relying on any fraudulent acts done by the Appellee, Terminix Company, to support his argument that the Statute of Limitations begins to run in a breach of warranty case from the date the breach is discovered, or should reasonably have been discovered.

Assuming for the sake of argument that the Appellee, Terminix Company, on April 15, 1946, when the holes were drilled in the cement floor, did breach a contract of implied warranty that the work would be done in a workmanlike manner, this action was not filed until July 18, 1949, more than three years after the alleged breach, and your Appellee submits that the three year Statute of Limitations in force and effect in the District of Columbia ran against and barred such action.

The general rule is set out in 34 Am. Juris at page 110, where it is stated as follows:

"In accordance with the established rule already discussed, the statute of limitations begins to run in civil actions on contracts from the time the right of action accrues. This, ordinarily, is the time of the breach of the agreement, and not the time that actual damages are sustained as a consequence of the breach. The gist of the action is the breach, not the consequential damages which subsequently accrue; such damages are not the result of a new or continuous breach, but relate back to the original one which gave the right of action and without which they could not exist."

and this settled rule applies in actions on implied and quasi contracts.

34 Am. Juris 117

The General rule and the established rule in the District of Columbia in the ordinary case dealing with the Statute of Limitations is that which is set out in the case of *Herfurth v. Acker*, reported in 85 U. S. Appeals D. C. 158, 177 F. (2d) 38, where the Court states as follows:

"Appellant (1) made payments to persons from whom appellee had got materials, and (2) learned the exact cost of completing appellee's work, within three years before suit was brought. But those events did not, as appellant contends, make the suit timely. They determined damages but did not create claims. Claims arise when contracts are broken, not when the resulting damage is precisely ascertained."

See also the case from the Supreme Court of Texas of *Houston Waterworks Co. v. Kennedy*, 70 Tex. 233, 8 S. W. 36, where an action was brought for damages to a building caused by the cutting of an arch support in connection with placing a water-pipe in the building, where the Court states, at pages 37, 38, as follows:

"If however, the act of which the injury was the natural sequence was a legal injury, . . . then, be the damage however slight, limitation will run from the time the wrongful act was committed, and will bar an action for any damages resulting from the act, although these may not have been fully developed until within a period less than necessary to complete the bar . . . For the injury then done to the arch the appellee could have maintained an action at once, and, having failed to do so for a period longer than two years, his action is barred. The fact that the extent of the damages he would have been entitled to recover was not so easily and clearly shown, at the time the cause of action accrued, as was this after

the wall of his house were cracked, furnishes no reason why the statutory bar should not be enforced. It has been held, in cases where there was fraudulent concealment of a cause of action, that the statutes of limitation would operate until the facts became known, or by the exercise of ordinary diligence might have been known. This rule, so far as we know, has never been applied to cases such as the one now before us; but, on the contrary, it has been steadily held that a mere want of knowledge by the owner of injury to his property does not prevent the running of the statute. 2 Greenl. Ev. Sec. 433; 2 Add. Torts, 600; Bank of Waterman, 26 Conn. 329; Kerns v. Schoonmaker, 4 Ohio, 311."

To demonstrate that the argument made by the appellant as to the time of the running of the Statute of Limitations only applies in cases involving fraud the Courts attention is called to the case of *Johnson v. Taylor*, 73 F. Supp. 537, wherein Judge Holtzoff of the District Court of the United States for the District of Columbia, states:

"This is an action to set aside an alleged forged release of a deed of trust, and to recover damages of the notary public, Edward F. Harris, and the surety on his bond, The United States Fidelity and Guaranty Company, caused by his wrongfully acknowledging the signature to the false instrument. In its answer the surety company pleads the statute of limitations, the applicable period in actions on a sealed instrument being 12 years. D. C. Code 1940, Title 12, Section 201. The defendant surety company moves for summary judgment.

(1) It is well settled in this jurisdiction that in an action based on fraud, the statute of limitations begins to run, not when the cause of action accrued, but from the discovery of the facts out of which the claim arose, or from the time when the facts should have reasonably been found out in the exercise of due diligence. This doctrine is manifestly conducive to advancing the ends of justice. Statutes of limita-

tions have frequently been denominated statutes of repose. Their purpose is to bar attempts to enforce stale claims, since lapse of time may prejudice the defendant in ascertaining facts or procuring and presenting evidence in support of his defense. On the other hand, they are not intended to assist one who has perpetrated a fraud that does not come to the attention of the injured party until a later date. Under these circumstances it is immaterial whether the action is legal or equitable in its nature.

This principle was enunciated many years ago in *Bailey v. Glover*, 21 Wall. 342, 347, 348, 349, 22 L. Ed. 636, as follows:

“In suits in equity where relief is sought on the ground of fraud, the authorities are without conflict in support of the doctrine that where the ignorance of the fraud has been produced by affirmative acts of the guilty party in concealing the facts from the other, the statute will not bar relief provided suit is brought within proper time after the discovery of the fraud.

We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.

“... the weight of judicial authority, both in this country and in England, is in favor of the application of the rule to suits at law as well as in equity. And we are also of opinion that this is founded in a sound and philosophical view of the principles of the statute of limitation. They were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which would show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, or by committing a fraud in a

manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.'

In the District of Columbia this rule was adopted in *Moses v. Taylor*, 17 D. C. 255, 6 Mackey 255, 281. Subsequently these principles were exhaustively considered and approved in *Lewis v. Denison*, 2 App. D. C. 387, 391, where Mr. Justice Shepard wrote as follows:

" 'That the bar of the statute of limitations will not commence to run in equity until the fraud has been discovered, or until such time as by the use of ordinary care it might reasonably have been discovered, is now universally conceded. There has, however, been great diversity of opinion with respect to the operation of this rule in actions at law. The question was thoroughly considered by Story, J., in the Circuit Court, at an early day, and after an exhaustive review of the authorities, and discussion of the principle, he considered that the rule should be made to apply at law as well as in equity. See *Sherwood v. Sutton*, 5 Mason 143. The weight of authority at the present time supports the conclusion.'

The learned Justice then quoted from *Bailey v. Glover*, *supra*, and indicated that these principles constituted the law in this jurisdiction.

These views were reiterated in *P. H. Sheehy Co. v. Eastern Importing & Mfg. Co.*, 44 App. D. C. 107, L. R. A. 1916F, 810, and recently again in *Young v. Howard*, 73 App. D. C. 340, 120 F. 2d 712, in which Mr. Justice Vinson wrote the opinion."

It must be noted in this decision that Judge Holtzoff states that these views were reiterated in the case of *P. H. Sheehy Co. v. Eastern Importing & Mfg. Co.*, 44 App. D. C. 107, relied on so heavily by the appellant, clearly showing that in that case the question of fraud was involved. In fact, the syllabus of that case and the language of the Court in its opinion on page 111 thereof,

"Statutes of Limitations were enacted to prevent fraud," clearly shows that the case was considered as one involving fraud.

Appellant argues further that there was no allegation of fraud in the Sheehy case in the District Court and that it was disposed of by the District Court on the pleadings and affidavits filed therein, referring to Vol. 249 of the Briefs and Records of the United States Court of Appeals.

An examination of the Amended Pleas and Affidavit of Defense filed in the case set forth facts which, in the opinion of appellee, amounted to allegations of fraud, at least constructive fraud, and part of the decision of Chief Justice Shepherd in the case indicates an intention to apply the rule that the statute of limitations, in fraud cases, does not begin to run until the fraud is discovered or by the exercise of reasonable diligence could have been discovered. In support of this contention, on page 111 of the opinion, the court stated:

"The vendor knew that plaintiff was a wholesale grocer when he made the sale, and that it was not likely that the time condition of the goods sold would be discovered except on examination by retail dealers."

The facts in the Sheehy case and the above quoted portion of the decision are also in accord with a portion of the opinion below of the Municipal Court of Appeals for the District of Columbia (Jt. App. 12) where that Court states:

"There appears to be a distinction made by some courts between a warranty as to kind or quality, which is broken when made, where the statutory period is computed from the date of the sale, and a warranty relating to a future event when its truth can be ascertained, which warranty is not broken until the future event happens. *Ingalls v. Angell*, 76

Wash. 692, 137 Pac. 309; J. K. Kennard & Sons Carpet Co. v. Dorman, 64 Mo. App. 17."

Here, the alleged breach of implied warranty occurred on April 15, 1946, and had no relation to the happening of some future event as pointed out by the Municipal Court of Appeals, (Jt. App. 13), as follows:

"The present case involves no breach of warranty as to the condition or quality of goods sold by defendant as to either its present or prospective state, but deals wholly with whether or not the action of defendant company in drilling holes in appellant's cellar in April 1946 to inject insulating material was done in a workmanlike manner. There is no evidence of concealment by the defendant company of the work that it performed in 1946. It did fill in the holes that it had bored in the cellar floor. This was necessary to complete the insulating work. Concealment by mere silence is not enough. There must be some trick or connivance intended to exclude suspicion and to prevent discovery of the cause of action by the use of ordinary diligence. No such charge is made against the defendant here, or disclosed by the record. Appellant testified that he did not discover that his cellar was damp due to the careless drilling of the holes in the floor until 1948 or 1949. In ordinary course, it could be reasonably anticipated that any damage, if due to the alleged negligent performance of the insulating contract, would have been revealed or discovered within three years."

The appellant also stresses language from the case of *Cole et al v. Zellan*, 55 A. (2d) 516, decided by the Municipal Court of Appeals for the District of Columbia on November 6, 1947, and the fact that this court in the case of *Zellan v. Cole*, 87 U. S. App. D. C. 9, 183 F. (2d) 139, 140, did not expressly dispute the rule announced in the Municipal Court of Appeals decision, as sustaining his argument that the statute of limitations does not begin to run for breach of warranty until the discovery of the breach or by the exercise of ordinary diligence, could have been discovered.

Appellee respectfully submits that the language and general rule referred to in the Municipal Court of Appeals decision was mere dicta as that court stated, on page 517 of the decision, as follows:

"But that general rule does not fit the circumstances of this case."

This Court, in affirming the same case on appeal, *Zellan v. Cole*, 87 U. S. App. D. C. 9, 183 F. (2d) 139, looked to the actions of the parties in order to discern what they meant by their contract and on page 139 of the opinion stated as follows:

"It is clear from these facts that the parties took the contract to be a promise to maintain a dry basement. Under this construction, the statute of limitations began to run when the contractor abandoned his efforts. This was, in effect, the result reached by the Municipal Court of Appeals, and its judgment is, therefore, affirmed.

"This court does not concur in the view of the Municipal Court of Appeals that the statute of limitations began to run when the basement first became wet but was thereafter tolled by action of the parties. That view would write into the law an unrecognized exception to the statute of limitations. The statute itself prescribed conditions upon which it is tolled, and such other conditions as accomplish a tolling are established in the law. The cases cited by the Municipal Court of Appeals are readily distinguishable. The view of this court is that the statute began to run when the contract, interpreted according to the intent of the parties, as ascertained from their actions, was breached."

By holding that the Statute of Limitations began to run when the contractor abandoned his efforts and breached his contract this Court definitely stated the law in this jurisdiction and applied the general rule that the Statute of Limitations began to run when the breach occurred.

CONCLUSION

The judgment of the Municipal Court of Appeals that the statute of limitations ran from the time of the breach of the implied warranty to do the insulating work in a workmanlike manner and such breach having occurred in April, 1946, appellant's right of action is barred because filed more than three years thereafter, should be affirmed.

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